Wisconsin Towns Association

Richard J. Stadelman, Exec. Director
W7686 County Road MMM
Shawano, Wis. 54166

Tel. (715) 526-3157
Fax. (715) 524-3917
Email: wtowns@frontiernet.net

To: Assembly Committee on Rural Affairs
From: Richard J. Stadelman, Executive Director
Re: AB 423 relating to "extraterritorial plat approval"
Date: November 28, 2008

Wisconsin Towns Association fully supports passage of AB 423 relating to extraterritorial plat approval on the basis of the land's use. This bill would reverse the effect of the Wisconsin Supreme Court decision in Wood v. City of Madison, 2003 Wis. 24, 260 Wis. 2d 71, 659 N.W. 2d 31 (Wis. Sup. Ct. 2003). The Wood case overruled the Court of Appeals decision in Boucher Lincoln-Mercury v. Madison Plan Comm., 178 Wis. 2d 74, 503 N.W. 2d 265 (Ct. App. 1993) which had held that extraterritorial pat approval or denial based on the use of the land in the plat is unilateral land use control (i.e. zoning) and that the statutes require extraterritorial zoning to be a cooperative effort between the city and the town in which the zoning ordinance is in effect. Passage of AB 423 would return to the legal standard before the Wood decision and reinstate the legal holding of the Boucher case which had been the law for nearly 50 years or more.

Extraterritorial plat approval is the authority cities over 10,000 in population have to review land divisions/plats within three miles of their corporate borders and cities under 10,000 and villages authority to review land divisions/plats within 1 ½ miles of their corporate borders. Extraterritorial plat approval has been in state law since 1909 in some form, initially only being available to cities within 1 ½ miles of their borders and eventually being extended to three miles for cities over 10,000 in population and 1 ½ miles for cities under 10,000 and villages.

A very detailed history of the extraterritorial plat authority is described in Justice David T. Prosser's concurring decision in the Wood case. This history notes the focus of extraterritorial plat authority of cities and villages over the years was how land was "divided and developed" in the extraterritorial areas, it was not focused on the proposed "land use." Justice Prosser quoted a 1959 law review article of Marygold Melli entitled *Extraterritorial Planning and Urban Growth, 1959 Wis. L. Rev* {see paragraph 78 at page 107-108 of 260 Wis. 2d as follows:

> In Wisconsin, a municipality may adopt a master plan covering any area beyond the municipal boundaries related to the development of the municipality. In addition, the specific grants of extraterritorial power have been made by the legislature for subdivision approval and official maps to cover certain limited areas. ***Zoning remains the major field in which no extraterritorial power has been granted.*** **(Emphasis added by Justice Prosser.)**

Justice Prosser's detailed history points out that Chapter 241, Laws of 1963 created Sec. 62.23 (7a) of Wis. Statutes which created extraterritorial zoning. This same section exists today. In the 1993 case of Boucher Lincoln-Mercury, Court of Appeals Judge Robert D. Sundby (who had served as a former Attorney for the League of Wisconsin Municipalities) noted that Sec.

62.23 (7a) of Wis. Statutes does not give a municipality "unilateral authority to zone" land in an unincorporated towns within municipality's extraterritorial jurisdiction. **"Rather, the statute** {Sec. 62.23 (7a) of Wis. Statutes} **required that extraterritorial zoning be a cooperative effort of the city plan commission and the town in which the zoning ordinance will be in effect."** (See page 109 of 260 Wis. 2d 71)

Judge Sundby in the Boucher case went on to point out that the Legislative Council Urban Problems Committee prior to adoption of Sec. 62.23 (7a) {extraterritorial zoning} had "rejected a proposal giving populous counties authority to adopt comprehensive zoning ordinances and would apply throughout the unincorporated areas without the approval of the individual towns" Judge Sundby in the Boucher case at page 101 of 178 Wis. 2d wrote, **"while Chapter 236 and Sec. 236.45... confer broad regulatory authority upon local governing bodies, that authority relates to the *quality* of the subdivision or land division and not to the use to which lots in the subdivision or land division may be put."** (emphasis added by Judge Sundby)

Justice Prosser in his concurring decision stated at paragraph 97 at page 118 of 260 Wis. 2d, that while extraterritorial subdivision authority was a broad authority:

> *There is a point, however, at which the legislature's grant of authority to Madison and other municipalities to actually **control** land use extraterritorially comes to an end, unless these municipalities have exercised lawful authority to zone the land. The court of appeals concluded in the Gordie Boucher case that this point had been reached.*

Justice Prosser in the Wood decision quoted Judge Sundby's unanimous decision in Boucher as follows:

> *The legislature has not given the city's master plan, a planning tool, pre-eminence over county zoning, a regulatory tool.... There is no authority for the commission's contention that a county zoning ordinance is subordinate to the city's master plan. We reject the commission's contention; it has no support in the statutes or case law.* (See paragraph 102 at page of 260 Wis. 2d, Wood case)

Justice Prosser went on to say that "this analysis is unassailable.... It is fundamental Wisconsin Law. He stated further:

> *There can be no dispute that the legislature has given Wisconsin municipalities **expansive** subdivision regulatory powers to encourage broad land use objectives and sometimes to enforce them. It has given municipalities substantial planning authority, even beyond three miles of the municipality. But it has not authorized municipalities to in effect-rezone land by means of extraterritorial subdivision regulation and/or extraterritorial planning. It has not given municipalities power to veto use of land that are consistent with lawful existing zoning, absent reasonable quality concerns or subdivision defects. That is what Gordie Boucher held, and there is no reason to overrule the case.*

Justice Prosser agreed with the majority that the property owners in the Wood case were properly denied their request for a plat under the city subdivision ordinance as the ordinance applied how the plat proposed to be developed, but not based upon the majority's holding of a proposed use, thus reversing the Boucher case. Justice Prosser wrote at paragraph 111 of page 122 of 260 Wis. 2d:

...A municipality may not seek to compel a particular land use that contradicts a validly enacted zoning ordinance by arbitrarily rejecting a plat under the extraterritorial component of its subdivision ordinance. This is the core teaching of the Gordie Boucher case. FN 11

FN11 *A municipality may condition its approval of a plat on the plat's compliance with the municipality's master plan, but the municipality may not enforce a master plan that exceeds its authority. In addition a municipality may not block an otherwise valid subdivision until the subdivider donates 75 percent of the land to the public.*

Attached to this memo are the last two pages of Justice Prosser's concurring decision in the Wood case in which he points out the consistency of Judge Sundby in the Boucher case, Marygold Melli in the 1959 law review article, and Professor Beuscher, a renown land use expert in the 1950's and 1960's in his report *"Land Use Controls"* published in 1967 by the Wisconsin Department of Resource Development that there is a distinction between "subdivision/land division control" and "zoning."

It is Wisconsin Towns Association position that Wisconsin Supreme Court majority decision wrongly decided the Wood v. City of Madison case by holding that the city may deny the subdivision/plat on the use of the land and reversing the Boucher case. The Wood case overturned nearly 50 years of legal history and a unanimous court of appeals decision. Note the Wood case was a 4-3 split decision on the reversal of the Boucher case. AB 423 will reinstate the fifty years of limiting extraterritorial subdivision/plat approval to how the land is "divided and to be developed" not the proposed "use" of the land.

The practical result of the Wood decision since 2003 has been that cities and villages across the state have used the newly created extraterritorial power has rendered the extraterritorial zoning statute as meaningless. There is no incentive for cities and villages to even talk to their neighboring towns about cooperative efforts on their borders. Extraterritorial zoning under Sec. 62.23 (7a) of Wis. Statutes is based upon a negotiation and cooperation to reach an extraterritorial agreement. AB 423 will restore the incentive to return to the use of Sec. 62.23 (7a) to regulate land use.

Wisconsin Towns Association believes that AB 423 should be passed to restore the historical significance of cooperation under extraterritorial zoning pursuant to Sec. 62.23 (7a) of Wis. Statutes. To allow the Wood case holding to stand results in less cooperation and more conflict on municipal boundaries.

Thank you for your consideration.

tions list a purpose to "further the orderly layout and use of land." To "further" something is to "help the progress of" or "advance" something. *The American Heritage Dictionary of The English Language* 737 (3d ed.1992). It does not imply control of something. Moreover, the word "orderly" modifies "use," just as "orderly" modifies "layout." Furthering the orderly use of land is different from controlling the use of land.

¶ 109 Looking at the other language relied upon, we see the terms "reasonable consideration" and "encouraging the most appropriate use of land." "Reasonable" implies that not all "consideration" will pass muster. "Encourage" is a conditional verb like "further," different from "control" or "effect." These words do not connote the unlimited subdivision regulatory authority the majority appears to embrace. This is especially evident when all the passages relied upon are returned to the context from which they have been taken.[FN10]

> FN10. "[I]t is ... well established that courts must not look at a single, isolated sentence or portion of a sentence, but at the role of the relevant language in the entire statute." *Alberte v. Anew Health Care Servs.*, 2000 WI 7, ¶ 10, 232 Wis.2d 587, 605 N.W.2d 515 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987)).

****56** ¶ 110 Third, the very existence of conditional words in the declarations recognizes the limits on subdivision regulation and the need to harmonize it with zoning, both extraterritorial and otherwise. Zoning, like subdivision regulation, is an exercise of the police power. When a municipality is given statutory ***122** authority to pass a subdivision ordinance to "promote the public health, safety, and general welfare of the community"-words reflective of the police power-the municipality is not thereby given authority to include explicit zoning in the subdivision ordinance.

¶ 111 The certified question before this court is stated by the majority: "Does Wis. Stat. ch. 236 authorize a municipality to reject a preliminary plat under its extraterritorial jurisdictional authority based on a subdivision ordinance that considers the plat's proposed use?" Majority op. at ¶ 2. The key word in this question is "reject." The obvious answer to the question is "sometimes," depending upon the facts and whether the rejection is "reasonable." There is no absolute "yes" or "no" answer. A municipality may not seek to compel a particular land use that contradicts a validly enacted zoning ordinance by arbitrarily rejecting a plat under the extraterritorial component of its subdivision ordinance. This is the core teaching of the *Gordie Boucher* case.[FN11]

> FN11. A municipality may condition its approval of a plat on the plat's compliance with the municipality's master plan, but the municipality may not enforce a master plan that exceeds its authority. In addition, a municipality may not block an otherwise valid subdivision until, say, the subdivider donates 75 percent of the land to the public.

¶ 112 "Consider" is not the key word in the certified question. The majority opinion observes that "any regulation relating to the 'quality' of a subdivision must necessarily *consider* 'the most appropriate use' of land. We cannot fathom how an ordinance can *consider* the most appropriate use of land if it cannot *consider* the use of land." Majority op. at ¶ 30 (emphasis added). Of course, a platting authority may *consider* the use of land, but it may not impose an authorized end by an ***123** unauthorized means. The certified question is not the correct question because it is not a question susceptible to a precise answer.

¶ 113 Judge Robert Sundby was an architect of the Wisconsin subdivision statute. He was a zealous advocate of municipalities. The majority's failure to acknowledge Judge Sundby's pivotal role in reforming chapter 236 of the Wisconsin Statutes is surprising. In *Gordie Boucher*, Judge Sundby faithfully applied the provisions of chapter 236, including Wis. Stat. § 236.45 in pari materia with Wis.

Stat. § 62.23(7a).

¶ 114 Even scholars who have sought to minimize the distinction between subdivision control and zoning have understood and respected the distinction. Marygold Melli wrote forthrightly that "Zoning relates to the type of building development which can take place on the land; subdivision control relates to the way in which the land is divided and made ready for building development." Melli, *Subdivision Control in Wisconsin,* 1953 Wis. L.Rev. 389, 389.

¶ 115 Professor Beuscher, a tireless advocate for land use planning, nonetheless was careful to recognize property rights:
Though planning and plan implementation of necessity focus on public needs and desires, it is important to be aware of and understand private property rights which exist and are protected by both the federal and state constitutions. ****57** The goal of the courts as arbiter between the public actions which are in conflict with or encroach upon alleged private property rights has been to strike a balance-a balance which will on one hand allow needed public programs to be carried out and at the same time preserve as large a sphere as possible within which the private decision-maker and private property rights may be exercised.

***124** Beuscher, *Land Use Controls, supra,* at I-2.

¶ 116 Beuscher also wrote that "it must be conceded that literal application of the requirement that the subdivision comply with the approved master plan would violate the 14th Amendment in some instances ... because the regulatory impact on the particular landowner [would be] so great as to constitute an invalid taking of property in his case." *Id.* at IV-23. "If the plan commission stands pat and refuses to approve the plat and the council does not buy or condemn the land, the owner may be left in the position of not being able to earn a fair return on his land; and a court would probably declare the *application* of the master plan unconstitutional." *Id.* (emphasis added). A subdivision ordinance may be unconstitutional *as applied* to specific facts.[FN12]

FN12. The Woods have not advanced an argument relating to the constitutionality of Madison's rejection of their plat and, therefore, the parties did not brief this issue.

¶ 117 The City of Madison has repeatedly shown hostility to unapproved development in its extraterritorial plat approval jurisdiction. Consequently, a subdivider in Madison's extraterritorial jurisdiction will have to submit meticulous quality plats if it hopes to prevail in the face of City opposition.

¶ 118 I am authorized to state that Justice JON P. WILCOX and Justice DIANE S. SYKES join this concurrence.
Wis.,2003.
Wood v. City of Madison
260 Wis.2d 71, 659 N.W.2d 31, 2003 WI 24

END OF DOCUMENT

122 W. Washington Avenue
Suite 300
Madison, Wisconsin 53703-2715

608/267-2380
800/991-5502
Fax: 608/267-0645

E-mail: league@lwm-info.org
www.lwm-info.org

To: Assembly Committee on Rural Affairs

From: Curt Witynski, Assistant Director, League of Wisconsin Municipalities

Date: November 28, 2007

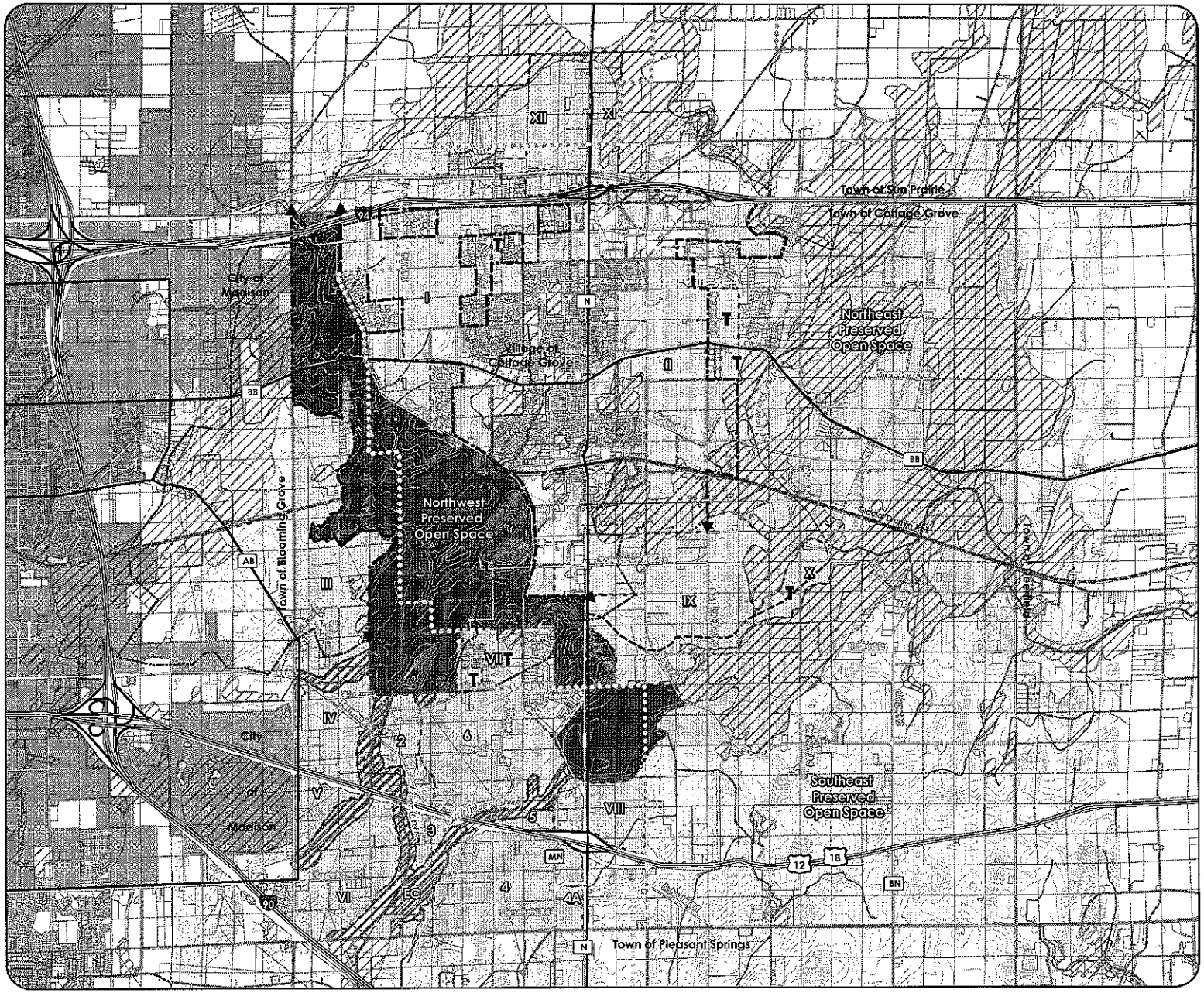
Re: Assembly Bill 423, Limiting Municipal Extraterritorial Plat Approval Powers

The League of Wisconsin Municipalities strongly opposes AB 423, which prohibits a municipality from denying a proposed land division within its extraterritorial plat approval jurisdiction because of concerns over the proposed use of the land. The bill overturns *Wood v. City of Madison* in which the Wisconsin Supreme Court held that a municipality can consider land use in conjunction with a subdivision ordinance as part of the extraterritorial plat review process.

In the *Wood* case the Woods sought approval from the City of Madison to divide a 52 acre parcel of land they owned in the Town of Burke into 11 lots. The Woods sought to change the zoning of nine of the proposed new lots from agriculture to commercial. The city rejected the proposed ordinance on the basis of standards within its subdivision ordinance designed to control sprawl. The City concluded that the subdivision of the bulk of the agricultural lands that exist on the Wood property would be a significant expansion of commercial land use in that particular area and create additional pressures on the conversion of the remaining agricultural lands that exist on the Wood parcel, as well as adjacent agricultural lands.

AB 423 significantly reduces municipal extraterritorial plat approval powers. Municipalities need effective tools for controlling growth occurring on their fringes. The best tool currently available for controlling sprawl is a municipality's ability to reject a proposed land division within its extraterritorial jurisdiction based on a subdivision ordinance that considers the plat's proposed use.

We urge you to vote against recommending passage of AB 423. Thanks for considering our comments.



Village of Cottage Grove
Town of Cottage Grove
City of Madison
Future Development Areas

CONCEPTUAL DRAFT

- Minor Roads
- Major Roads
- Planned Roads
- Highways
- Glacial Drumlin State Trail
- Long-Term City & Village Municipal Boundary Limits
- Cottage Grove Extra Territorial Jurisdiction
- Madison Extra Territorial Jurisdiction
- Vilas Hope Road Preliminary Lift Station Service Area as of April 11, 2007
- Current Municipal Boundaries
- Water
- Environmental Corridors
- Contours (10-foot intervals)
- Current Development
- Consensus Development Areas I - XI
- Possible Future Development Areas or Preservation Areas 1-6
- T Town Subdivision Development Areas
- Preservation Area (Sending Areas)
  - Northwest
  - Southeast
  - Northeast
  - Environmental Corridor

Type	Inside EC	Outside EC	Total
Current Development	271	2,790	3,061
Concensus Area I	6	907	913
Concensus Area II	315	1,222	1,537
Concensus Area III	37	665	702
Concensus Area IV	3	285	288
Concensus Area V	0	123	123
Concensus Area VI	1	399	400
Concensus Area VII	17	123	140
Concensus Area VIII	2	231	233
Consensus Area IX	39	765	804
Concensus Area X	3	122	125
Concensus Area XI	65	114	179
Concensus Area XII	93	523	616
Environmental Corridor	567	24	591
Northeast Preservation Area	3,537	1,724	5,261
Northwest Preservation Area	1,251	1,650	2,901
Southeast Preservation Area	123	4,278	4,401
Possible Future 1	0	156	156
Possible Future 2	1	157	158
Possible Future 3	0	79	79
Possible Future 4	1	536	537
Possible Future 4A	0	101	101
Possible Future 5	1	37	38
Possible Future 6	1	604	605
Total	4,788	17,156	23,949

Total Developable Acres	7,148
Total Preservation Acres	12,465

Date: October 9, 2007
Source: Dane Co LIO, MSA

0 1,000 2,000 Feet

N

66.1001 Comprehensive planning.

(1) DEFINITIONS. In this section:

(a) "Comprehensive plan" means:

1. For a county, a development plan that is prepared or amended under s. 59.69 (2) or (3).

2. For a city or a village, or for a town that exercises village powers under s. [illegible] (1) a master plan that is adopted or amended under s. 62.23 (2) or (3).

3. For a regional planning commission, a master plan that is adopted or amended under s. 66.0309 (8), (9) or (10).

(b) "Local governmental unit" means a city, village, town, county or regional planning commission that may adopt, prepare or amend a comprehensive plan.

(c) "Political subdivision" means a city, village, town, or county that may adopt, prepare, or amend a comprehensive plan.

(3) THE COUNTY DEVELOPMENT PLAN. (a) The county zoning agency may direct the preparation of a county development plan or parts of the plan for the physical development of the unincorporated territory within the county and areas within incorporated jurisdictions whose governing bodies by resolution agree to having their areas included in the county's development plan. The plan may be adopted in whole or in part and may be amended by the board and endorsed by the governing bodies of incorporated jurisdictions included in the plan. The county development plan, in whole or in part, in its original form or as amended, is hereafter referred to as the development plan. Beginning on January 1, 2010, if the county engages in any program or action described in s. 66.1001 (3), the development plan shall contain at least all of the elements specified in s. 66.1001 (2).

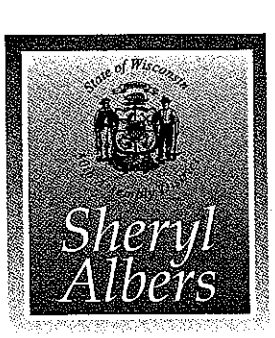
(b) The development plan shall include the master plan, if any, of any city or village, that was adopted under s. 62.23 (2) or (3) and the official map, if any, of such city or village, that was adopted under s. 62.23 (6) in the county, without change.

(c) The development plan may be in the form of descriptive material, reports, charts, diagrams or maps. Each element of the development plan shall describe its relationship to other elements of the plan and to statements of goals, objectives, principles, policies or standards.

(d) The county zoning agency shall hold a public hearing on the development plan before approving it. After approval of the plan the county zoning agency shall submit the plan to the board for its approval and adoption. The plan shall be adopted by resolution and when adopted it shall be certified as provided in sub. (2)

f). The development plan shall serve as a guide for public and private actions and decisions to assure the development of public and private property in appropriate relationships.

(e) A master plan adopted under s. 62.23 (2) and (3) and an official map that is established under s. 62.23 (6) shall control in unincorporated territory in a county affected thereby, whether or not such action occurs before the adoption of a development plan.



Testimony of State Representative Sheryl Albers On AB 423 to the Assembly Committee on Rural Affairs November 27, 2007

Good morning, and thank you Chairman Nerison and members of the committee for allowing a public hearing on Assembly Bill 423. My remarks today on this legislation will be brief. Although the terms I will use may sound technical in nature, this is a fairly simple bill.

Subsequent to 2003, the date the Wisconsin Supreme Court decided *Wood v. City of Madison*, planning bodies of cities and villages now have no qualms about denying proposed plats (the map of a subdivision) if any of the subject property is situated within the extraterritorial plat area of the city or village. Additionally, city and village planning bodies frequently impose conditions on a property owner, regarding subject properties, which the township has neither demanded, or which a township opposes. It is inappropriate for a town's master plan, a town's plan amendment (to its ordinances) to be rejected or altogether ignored by cities and villages, when certain statutes (59.69(2)) require otherwise.

Post-*Wood*, decisions of a city or village's planning body are controlling on land use determinations, though the property subject to the decision is not within the city or village's boundaries, even though a town said yes, the village or city said "no" to the proposed use. This means that persons who own property that is just outside a city or village, within that city or villages extraterritorial property zone, must approach multiple units of government (town, city or village, and county) to determine whether approval might be granted. This causes undue delays, and can prevent sales, when a planning administrator is not willing or

State Capitol Office: P.O. Box 8952 • Madison, Wisconsin 53708-8952
(608) 266-8531 • (877) 947-0050 • FAX: (608) 282-3650 • Rep.Albers@legis.wi.gov
District: 339 Golf Course Road • Reedsburg, Wisconsin 53959 • (608) 524-0022

unable to predict what type of action its planning board may take. The concept underlying planning is to provide for transparency, as well as ensure efficiencies and predictability of government.

The *Wood* decision instead wreaks havoc, in that town plans no longer carry any influence and makes the expenditures for planning wasteful; furthermore having to approach multiple units of government translates into less predictability. And, cities' and villages' planning bodies apparently now maintains it can disregard entirely decisions made by a town planning board, even decisions that are entirely consistent with the town's plan.

Previously, cities and villages, exercised control under Section 62.23 (7)(a) – the extraterritorial zoning statute which gives elected bodies of cities and villages a right to have input over decisions outside of their boundaries, limited however to either the 1.5 miles or 3 miles outside of the boundary line, dependent upon a particular municipality's population. The statute was intended to compel agreement.

The *Wood* decision voids this particular section of the statutes statute meaningless, for now many cities and, or villages, via their planning boards, are exercising zoning powers within extraterritorial areas unilaterally and without agreement of the impacted township.

Passage and enactment of AB 423 would reverse *Wood v. City of Madison,* restoring the language that was intended to require mutual agreement of the city or village, in regards to plat approval in sec 62.23 (7)(a).

This change would partially restore representative government to individuals who own property within a township, as any property owner may attend and speak

at a town's annual meeting. Cities and villages are not likewise required to hold an annual meeting, so the input of a person who owns property subject to extraterritorial zoning is extremely limited. Some property owners have requested that legislation be considered to vote in a municipality where they own property but do not reside as long as that is the only vote they cast, and I am pursuing drafting of such legislation.

However, AB 423 is of importance, for these types of change would make some headway to ensure that property rights are protected under state law, while at the same time, protecting laws which equate to "one-man/one-vote."

Bottom line – a plat should only be denied by cities and villages with the agreement of the town where the proposed plat would come to be located if approved. If a town supports a plat, backed by a town's plan, a city or village should not have veto authority over the town – for such action destroys representative government!

One amendment has been introduced that will include certified survey maps, in addition to the plats already covered by the bill and I would ask that the committee embrace the amendment as well as the bill.

Thank you for your time. I hope that you will take prompt executive action on AB 423, and I would be happy to answer any of your questions at this time.